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A Study in Mediation Styles: A Comparative Analysis of Evaluative and Transformative Styles

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Part 1: Introduction

Mediation is an approach to conflict resolution whereby a neutral third party assists the conflicting parties to reach an agreement that both parties feel is fair. Mediation has been growing in popularity as a method of conflict resolution over the last thirty years, often as an alternative to going to court. Research on this topic is increasing as the success of mediation is becoming recognized. As Mosten explains, “Disputants consider mediation less damaging to relationships, and...mediation helps parties identify real issues, feel as if they were treated fairly, and feel as if they were treated with dignity and respect” (Mosten 432). Mosten also states the public sees mediators as “consumer friendly” (432).

However, even within the mediation approach to conflict resolution, there are several different styles. There are several reasons for these different styles, from the variety of cases that utilize mediation to mediator preference. I became interested in the use of these different styles after reading “Mediation Styles: The Purist vs. The ‘Toolkit’” by Jon Linden. In this article, Linden introduces four styles of mediation commonly used today: facilitative, evaluative, transformative and narrative. He goes on to introduce what he calls the “toolkit” style which allows the mediator to use any style or combination of styles necessary during any given mediation. After taking a course in conflict resolution, I decided to research the different styles on my own. Before explaining in detail the different styles that were researched, this study will explain 1) what mediation is and why it is used; 2) give a brief overview of the primary styles of mediation, and 3) explain the methodology for the research in this study.

What is mediation and why is it used?

Anyone who has ever helped two family members or friends get through a disagreement has acted as a mediator. Mediators have been a part of most every

society, although recently “these people and institutions have sometimes been formalized, neutral, and process focused...” (Mayer 191). As stated earlier, a mediator acts as a neutral third party in a conflict. In contrast to a judge, a mediator helps the two parties reach an agreement on their own. A mediator does not make decisions for the parties and has no stake in how the conflict turns out.

Mediations can range from informal to formal, depending on the nature of the conflict, the mediator, his or her style, his or her role in the conflict, and the setting. Some examples of informal mediators may be religious leaders or community leaders. More formal mediators can be found within the court system or school system. Whether informal or formal, a mediator’s purpose remains the same: to help the conflicting parties reach an agreement.

When mediators become a part of a conflict, they undoubtedly change the dynamic of the conflict. According to Mayer, mediators change the dynamic of the conflict in four ways. First, mediators bring a different structure to the conflict. People will present their cases differently in front of a third party and mediators usually set a structure for communication, giving each party time to talk. Second, mediators bring their commitment, vision and humanity to the interaction. Mediators have faith in mediation as a form of conflict resolution and their optimism that an agreement can be made affects the process. Third, mediators bring sets of skills. Since mediators deal with conflict daily, they learn skills such as reframing and analysis to identify issues and options. This often has a comforting effect on the parties involved. Fourth, mediators bring sets of values and ethics. This helps set a foundation that hopefully brings trust, respect and comfort to the parties and the process (193).

Each mediator is different, just as every human is different. Some prefer to talk a great deal during a mediation, while others prefer to talk very little. Another variation is the use of caucuses. A caucus is a meeting with the mediator and one party involved in the conflict, separate from the joint mediation among all parties. During this time, one party may disclose information to the mediator that he or she does not feel comfortable disclosing in front of the other party or parties. Some styles do not use caucusing, while others use it every time (Billikopf-Encina, “Contributions of...” 3).

Mediation can be used for most all types of conflict. Oftentimes, a court will mandate that the parties attend mediation. This is common in cases such as divorce, small claims, and assault (first time offenders), just to name a few. In many cities there are also community mediation centers for non-law related conflicts between neighbors, friends, or family members. On the other end of the

spectrum, mediation has been used internationally and inter-culturally in situations, such as the Loyalists and Republicans in Northern Ireland and the Israeli-Palestinian conflict. No matter how large or small the conflict, mediation is probably an option. During a mediation, the mediator controls the structure and language to a large extent depending on the style he or she uses, therefore modifying how the conflict is resolved (Wall 374). This is the main purpose for studying the different styles that are utilized.

Overview of the Primary Mediation Styles

There are four primary styles that are used by mediators today: Facilitative, Evaluative, Transformative and Narrative. This study will explore Evaluative and Transformative in depth in the following pages; however, this section will provide a brief overview in order to put these styles in relation to one another.

Facilitative is the most structured and the most utilized style of mediation (Linden). In the 1960's and 1970's, Facilitative mediation was the mainstream—the only style taught or practiced. The facilitative mediator “asks questions; validates and normalizes parties' points of view; searches for interests underneath the positions taken by parties; and assists the parties in finding and analyzing options for resolution” (Zumeta). A mediator using this style is completely neutral. He or she does not give advice, recommendations or opinions (Etcheson 394). Zumeta states that the reason the facilitative mediator does not offer advice, recommendations or opinions is because this style developed when most mediators were volunteers and, thus, were not required to have expertise in the area of the dispute.

Evaluative mediation developed in the 1980's in response to the increased number of court-ordered and court-referred mediations (Etcheson 394). The evaluative mediator intervenes in the mediation more than the facilitative mediator by making recommendations or providing opinions as to what might occur should the case go back to court (Zumeta). Evaluative mediation is often used when money is an issue in the dispute. The evaluative mediator often has some expertise “in the substance of the dispute and applies his or her knowledge to offer an opinion of the merits of the case. This evaluation can either apply to the legal issues or factual issues, be they financial, engineering related or otherwise” (Russell). A mediator using this style may also point out strengths and/or weaknesses of the positions proposed by each side of the dispute.

Transformative mediation is considered one of the newer styles of mediation. This style was labeled “transformative” in the book, *The Promise of Mediation* by Bush

and Folger. While the transformative style still keeps the structure of the facilitative style, it also seeks to empower each of the parties and encourage each party to recognize the other party's point of view. The goal of this style is to transform the relationship between the two disputants during the mediation through empowerment and recognition (Zumeta). This style focuses a great deal on interaction and communication between the disputants (Linden).

The last style to be described is Narrative mediation. Narrative mediation "borrows much of [its] work from narrative therapy" (Billikopf-Encina, "Narrative Mediation..." 100). This style of mediation presupposes that people become caught in the conflict cycle because they see themselves as being bound to it. A mediator using this style gets the parties to view the conflict from a distance, through story telling. After they finish with the story, the parties work with the mediator to create a new story where the conflict is replaced by an agreement leading to resolution. The goal is to get the parties to detach themselves from the conflict (101). Linden states that this style works well when the disputants have an on-going relationship past the mediation.

Research Method

To fully understand and explain the use of different styles of mediation, this study will examine evaluative and transformative mediation in a three-part process. First, this study will examine the literature and case studies already written on the subject. This helps us to gain a better understanding of each style and set a list of expectations associated with each style. Next, this study will report on field observations of three mediators in the Kansas City area who practice the different styles. These mediators agreed to let me observe a few of their mediations so I could experience first hand the different processes, styles and mediators. Last, this study will report information acquired through interviews with two mediators about the styles they use and their effectiveness. The case studies that are included in this study are the mediations that I observed during this process.

Part II: Analysis

This section of the study will present the research that was conducted on Evaluative and Transformative mediation.

Evaluative Mediation

As stated above, the evaluative mediator provides structure for the mediation, as well as opinions, recommendations and advice. The process is modeled according to "settlement conferences held by judges" (Zumeta). Throughout the mediation,

the evaluative mediators may try to predict how a judge might react given the strengths or weaknesses of each party's case. Because they can do this, evaluative mediators often have a great deal of knowledge about law. They can be lawyers or judges. Zumeta says that support for evaluative mediation comes from the fact that "clients want an answer if they can't reach agreement, and they want to know that their answer is fair." Obviously, the downside to this style of mediation is that at times a mediator's prediction may not be correct.

Evaluative Mediator Case Study #1

Carl entered into mediation with Ted because Carl bought two computers from Ted nine months ago. Ted promised to drop off a warranty for the computers within two days after the purchase was made. The warranty was to cover parts and service for the computers for two years. Carl said that Ted never dropped off the warranty and that both computers were not even functional now. After many attempts to contact Ted, Carl filed a small claims lawsuit against Ted for \$2000. The judge turned the case over to mediation.

When the mediation began, the mediator gave a very brief overview of mediation saying that the mediator would work with the two parties in an attempt to resolve the conflict among the three of them and if they could not reach an agreement that the case would go back to court. He did not discuss any restrictions for the conversation except that by law he would have to report any child or spouse abuse, should it be disclosed during the mediation. The mediator then invited Carl to tell his story. The two disputants spoke mainly to one another, although at times they did address the mediator. When it came time for Ted to tell his story, he said that Carl had his cell phone number and he had never received any messages from Carl. He apologized for not dropping off the warranty. He claimed he was just busy.

Within the first five minutes of the mediation, the mediator stopped the disputants because they were repeating themselves. He asked some clarifying questions about dates and then asked each person what type of resolution they thought would be fair. Carl wanted two new computers, with a new warranty or \$2000. Ted said that he would not do that, but that he would repair the computers, replacing most of the main parts at his cost, and would provide a new warranty for the next two years. Carl felt that was fair, so the mediator wrote out an agreement, each party reviewed it and they all signed it. The mediator reminded both parties that if Ted did not fulfill his part of the agreement within three weeks that the case would go back to court. There was very little talking on the part of the mediator, except to

clarify facts or bring the parties back to focus on the dispute and how to resolve it. The entire mediation lasted about 45 minutes. *

Evaluative Mediator Case Study #2

Mary filed a small claims suit against Mel for \$1500. Mary had paid for Mel's speeding ticket, his rent and other miscellaneous things for two months because Mel was low on money and had promised to pay her back. The judge turned the case over to mediation.

Immediately, Mary told the mediator that she had to leave in 30 to 45 minutes because she was leaving the country and she did not realize that it would take so long for the judge to get to her lawsuit. The mediator told Mary that it would be difficult for them to go through mediation in such a rush, but Mary insisted. The mediator asked Mary to tell her story very quickly, so Mary simply stated that she had paid for some things of Mel's and she wanted to be reimbursed. Mel said he knew that he owed her money but that he had not paid her because Mary's parents were harassing him and he was sick of it. The mediator gave some examples of past cases that ended in resolution and how they went about doing that.

Five minutes after beginning, the mediator held a caucus. First, she met with Mary and asked her what resolution she would be happy with. Mary said she wanted to be paid back in full and that he could pay her anytime within the next two months, even though she would be out of the country for the next six months. Then the mediator met with Mel, very quickly, and he said that he could pay her back at a minimum of \$300 a month until she was paid back the full \$1500. He only requested that she and her family stop harassing him.

After caucusing, the mediator brought the two together and asked Mary if she would be satisfied with Mel paying her in payments each month of at least \$300. She said she would be fine with that. Then she asked Mel if he wanted to bring any other issues into the agreement other than the payment plan. He asked that she and her family stop harassing him as long as he was making the payments on time. They all agreed and the mediator wrote up the agreement, which they all signed. Mary had to leave immediately, so the mediator mailed a copy of the agreement to her. In this mediation, the mediator did most of the talking. The entire mediation lasted 35 minutes.

Analysis

The two case studies above are observations of two different mediators using the evaluative style. Even though the two mediators use the same style and worked for the same courthouse, they conducted the mediations very differently. One mediator did not use caucusing at all, while the other used it almost immediately. Unlike the description of evaluative mediation given above, neither mediator offered predictions of how a judge might rule, although the first mediator did remind the disputants twice that if they could not reach an agreement, the case would go back to court. One mediator did very little talking, while the other did most of the talking.

In both cases, the mediators focused on resolving the monetary issue that brought the disputants to court. There was no discussion of other issues that may have surfaced because of the conflict, or whether the disputants wanted to salvage any kind of relationship. Both mediations were handled matter-of-factly and quickly. Neither of the mediators prompted the disputants to talk about their feelings regarding the conflict.

Both of the mediators had worked within the court system for a while and had an idea of what would happen if the case went to court. The judge gave a lengthy description of mediation before the parties even entered into mediation, so the mediators did not feel they needed to cover the process again once the mediation began. Neither mediator laid any kind of ground rules for the process either. However, a process emerged that was very clear: asking both parties to tell his or her stories, then asking each party how he or she would like to resolve the conflict. In both of these cases, a resolution came quickly and both parties were satisfied, so there was not a great need to explore any other options or issues.

John Hall is a volunteer mediator who uses evaluative mediation. He has done many mediations over the years and has also done labor negotiations. He has a background in psychology that guides his attitude toward mediation. He says in his experience, evaluative mediation is necessary whenever there is a monetary charge to the conflict, because the conflict already has a monetary evaluation attached to it. Hall says that his mediations, “rarely go over two hours.” Perhaps this is because of the monetary focus.

During an interview, Hall also said that he “pressures the disputants to reach a resolution in other ways.” Mainly he says he uses silence because it makes the disputants nervous, so they start talking about either the conflict, or the resolution they would prefer. He also said that he allows the parties to speak to each other as much as possible, since the conflict is between them. He intervenes if the conversation becomes hostile or if the disputants are constantly repeating their

position, halting the progress of the mediation. Another reason that he does this is to help clear up miscommunication between the parties because sometimes the disputants have not really communicated with each other about what they see as the problem.

Some aspects of evaluative mediation came out during the case studies, such as the mediators sticking to a structure and having some expertise in the legal system. Other aspects arose in the case studies that were not given much attention in the literature, such as the monetary charge and speed of the mediations.

Transformative Mediation

In contrast to evaluative mediation, transformative mediation hopes to result in a more long-lasting change in how the disputants approach and deal with conflict. Bush and Folger state that, “adopting the transformative approach produces a greater likelihood that, when settlements are reached, they will be settlements that served the parties’ interests rather than the mediator’s” (106). In this style, the mediator brings empowerment and recognition to the resolution process, not opinions or advice.

In transformative mediation, the mediator explores several aspects of the conflict, and then attempts to put the conflict into a new context by reframing through language. “Framing refers to the way a conflict is described or a proposal is worded; reframing is the process of changing the way a thought is presented so that it maintains its fundamental meaning but is more likely to support resolution efforts” (Mayer 132). Reframing presupposes that language plays a key role in conflict, and therefore, changing the language used about the conflict puts the conflict into a new context—one that is hopefully easier to solve and deals with the main issues.

Reframing can be accomplished in four ways: 1) Detoxifying the language used about the conflict, 2) Defining the conflict in new ways, 3) Using effective metaphors to change how the conflict is viewed, or, 4) Shifting the conflict paradigm (134).

Detoxifying the language used helps to limit unproductive or attacking language that is emotionally charged. Reframing through defining the conflict is often done by presenting the conflict as a mutual issue that needs resolution. By defining the conflict as a problem to be solved by everyone, it promotes language for working together, rather than against one another.

Metaphoric reframing may simply be taking the competitive metaphors out of the resolution process. For example, instead of treating the conflict as a game using words like “bluffing” and “foul,” treat the conflict as a mountain, that after climbing together, both parties will be stronger and more experienced. The last type of reframing can be accomplished by shifting the paradigm. This seeks to transfer the whole “storyline” of the conflict. For example, changing a “hopeless situation” or “victim situation” into a “hopeful situation” or “learning process.” This is often the most difficult type of reframing because it requires shifting the way a person views conflict. Reframing offers opportunities for the mediator to empower the disputants throughout the process. (134-137).

Caucusing is also popular in transformative mediation for several reasons. Caucusing can be used to “find out what parties are not saying in joint session and to ‘test the waters’—to determine what parties might be willing to agree to in a settlement” (Bush and Folger 270). However, caucusing must be used carefully in transformative mediation. The mediator has to allow the parties to express what is important from the caucus in joint session in order to provide opportunities for recognition throughout the mediation (160). When one party can express in caucus that he or she identifies with the values that drove the other party to act in the manner that they did, the mediator can show that party how sharing that information with the other party can be important to reaching a solution.

The transformative mediator is always careful to remain completely neutral and let the disputants reach the agreement on their own, as it empowers them and gives them skills they can use in the resolution of future conflicts. In this way, transformative mediation has more in common with facilitative mediation than evaluative.

Transformative Mediator Case Study #1

This mediation began with pre-caucusing with each disputant in her home weeks before the actual mediation took place. Three high-school freshman were involved in a school fight where the mother of one of the girls filed assault charges against the other two girls. First, the mediator met with Sarah and her mother, who had filed the charges. The mediator explained in detail the mediation process, and the possible outcomes, and then asked Sarah if she would feel comfortable going through this process with the other two girls. She said yes, so the mediator asked her what happened and how it made her feel. She also asked her what she perceived were the main issues. Sarah said that these girls just jumped her and her friends at school and she had to go to the hospital for her injuries. She said gossip started the fight and now she is scared to go to school because they threaten her.

Then the mediator asked her what she thought needed to happen now. Sarah said she did not really know, but she wanted to go to school without being scared or receiving threats. After about fifteen minutes talking with Sarah, the mediator went to the home of the next girl, Julie, who had the charges pressed against her.

At Julie's home, the mediator met with her and her mother and asked the same questions. Julie stated that she did not even know why the charges were being pressed against her because she was not even involved in the fight. She was never suspended for the fight, when other girls, including Sarah, were. She said she felt scared and angry because she does not want assault charges at such a young age and because Sarah was going around school telling everyone she pressed assault charges against Julie. She hoped that through mediation the charges against her would be dropped. The mediator was never able to contact the third girl in the conflict.

The mediator scheduled a joint session with the two girls she was able to reach and asked them to tell the third girl, if they saw her, to come to the joint session, or call the mediator. When the time came for the mediation, Julie was the only disputant to show up. Julie and her mother said they had gone through a mediation with the school and brought the resolution that she and the other girls, along with their mothers had drawn up, with the help of the school board. Since the other disputants did not show up, the mediator asked Julie if she felt the resolution that they came to at school was fair and she said yes, so they ended the mediation.

Transformative Mediation Case Study #2

Two grade school girls, Lily and Anna, were involved in a fight at school and the school suggested that they go to mediation because Anna's glasses were broken in the fight and her mother wanted Lily's mother to pay for them. Just as the case study above, the mediation began with pre-caucusing at each girl's home. The same questions were asked of each girl. Both agreed to mediation and both said, "She started it."

When the two girls came together with their parents for the joint session, the mediator explained the process and confidentiality. Then she asked the girls what they thought would be appropriate guidelines or rules for the mediation. Lily said that there should be no interrupting and Anna said that there should be no name-calling. After they agreed to these guidelines, the mediator asked Lily to tell her story. Lily said it was her third day at a new school and Anna was calling her names so she called Anna names. Then she tried to get away through a crowd of students and Anna said, "Don't say those things to me," and then Anna hit her.

The mediator paraphrased Lily's story and asked her if she summarized it correctly. Lily said yes, then the mediator asked Lily how she felt after the fight, and Lily said "angry."

The mediator then asked Anna to tell her story. She said lots of kids were teasing Lily at school and Lily took it out on her. Anna said someone pulled her hair and when she turned around a group of kids pushed her into Lily to fight her. She said she hit Lily and then Lily hit her, knocking her glasses off. She said Lily stepped on them and broke them. Once again, the mediator paraphrased Anna's story and asked her if it was correct, then asked her how it made her feel. She said, "mad." Then the mediator asked Lily if she agreed with Anna's story and she said she did. The mediator asked, "Where do you think this needs to go from here?" and "How are things now?" Lily said she had been transferred to another school because of the fight so they have not even seen each other since. The mediator asked, "If you had to do it over again, what would you do differently?" Both girls responded that they would have walked away. Next, the mediator addressed the parents, asking them what they thought. Both responded that they did not know what really happened and just thought that their child was being bullied at school. Anna's mom said that she did not even want to worry about getting compensation for the glasses, since she now felt that both girls were at fault. Lily's mother said she was going to talk to the school district about getting Lily back into the school now that she knows that her daughter was not being a bully or being bullied.

The mediator asked the girls if there was anything they wanted to say to each other. Both girls said, "Sorry." The mediator wrote up the agreement that said, "We both made mistakes. We're sorry and want to put this behind us. We won't talk to our friends about the fight or the mediation." Immediately afterward, the parents apologized to each other and both families chatted about how to get Lily back into the school. The entire joint mediation took one hour.

Analysis

Both of these case studies were observations of the same mediator, different cases. Although it is not as obvious in the first case study, the mediator used many tools of transformative mediation that were outlined above. She paraphrased each girl's story as a tool of reframing the conflict with detoxified language and shifting the paradigm of the conflict from dramatic to neutral in the retelling of it. She also empowered both girls through this process, by letting them say how it made them feel and asking them what they thought should be done. Another example of empowering is in the second case study where the mediator allowed the girls to set the guidelines of the mediation. The mediator set the stage for each girl to

recognize the other girl's point of view when each girl told her story and vented her feelings. The main example of recognition came when the mediator asked Lily in the second case study if she agreed with Anna's telling of the story. Lily had to pause and see Anna's point of view, which she eventually identified with and agreed that it was correct. In some ways, the second case was ideal for a transformative mediator because as the process went along, the monetary charge of the broken glasses lost its emphasis and the real issues around the two girls fighting became the only focus.

By asking what the girls would do differently in the second case study, the mediator reframed the conflict as a learning experience for the girls on how to and how not to handle conflict. This is an example of the long-lasting effect that transformative mediators hope for.

During the pre-caucusing the mediator asked many clarifying questions to help her and the disputants identify the core issues that needed to be addressed. The answers to those questions became the focus of the following questions "What do you think needs to happen?" or "Where do you think we should go from here?" These questions helped the process of reframing and empowering. Diane Kyser, who does community mediation and uses the transformative style, has a great deal of faith in this style. She said, "I am surprised every time at what emerges as the real issues." Using this style, she finds that those issues surface and are easier to deal with when the parties themselves recognize them as the issues.

Part III: Evaluation of the Styles

Each style has its strengths and weaknesses. The evaluative style does not attempt to deal with any underlying issues in the conflict, which may or may not be affecting both the conflict and the resolution. However, in some cases, there may not be any substantial underlying issues and no post-mediation relationship to consider, making it unnecessary to attempt to deal with them. Transformative mediation seems to work well to uncover underlying issues, but the process takes much longer, including pre-caucusing. Also, it seems to border on therapy at times by asking, "How did that make you feel?" It is important to bring out feelings during the conflict resolution process, but at times there may be too much focus on feelings in the transformative style. The final conclusion of this study is that Jon Linden's "Toolkit" method is the best answer. For the case studies involving fights, the transformative method worked well for the most part; however, it would not have been as effective as a "purist" method for the small claims cases. One instance in the second evaluative mediator case study where transformative could have been helpful was when Mel began talking about being harassed. That issue

was just kind of glossed over and thrown into the agreement without any discussion. It could have just been for time reasons, but it did call for more attention than it was given.

The transformative style does appear to be effective when the parties do not show an interest in a post-mediation relationship. Also, the evaluative method does have its benefits when there is a monetary charge to the conflict. It will not do any good to address feelings and empowerment if you simply want an impersonal loan paid back. Just as every person is different, every conflict is different. The final conclusion of this study supports flexibility and skill on the part of the mediator in order to adjust to each new conflict, each new disputant, and the constraints that occur in the resolution process. Any kind of “purist” approach would no doubt prove effective at times and ineffective at others. Conflict is not mathematics; so one formula cannot be applied to all situations.

Names in case studies have been changed to protect client confidentiality.

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